STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 16, 2011
v	No. 298529 Oakland Circuit Court
MARK ANDREW OTT, Defendant-Appellant.	LC No. 09-225007-FC

Before: CAVANAGH, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Defendant was convicted of two counts of guilty but mentally ill of first-degree premeditated murder, MCL 750.316(a), and two counts of guilty but mentally ill of second-degree murder, MCL 750.317, after a jury trial. He was sentenced to concurrent terms of natural life imprisonment without parole for the first-degree premeditated murder convictions and 37.5 to 60 years' imprisonment for the second-degree murder convictions. Defendant appeals as of right. We affirm defendant's first-degree murder convictions but vacate defendant's second-degree murder convictions.

It is undisputed that defendant stabbed and killed his parents. Instead, defendant contends that he was legally insane at the time of the offense and maintains that there was insufficient evidence to support the jury's verdict that he was guilty but mentally ill. We disagree.

A challenge to the sufficiency of the evidence is reviewed de novo and in a light most favorable to the prosecution to determine "whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007).

Insanity is an affirmative defense. MCL 768.21a(1). A defendant is not guilty by reason of legal insanity if, as a result of mental illness, the defendant "lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." MCL 768.21a(1). On the other hand, a person will be found guilty but mentally ill if the person "has proven by a preponderance of the evidence that he or she was mentally ill at the time of the commission of that offense," but cannot establish "by a preponderance of the evidence that he or she lacked the substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct

to the requirements of the law." MCL 768.36(1). In Michigan, this burden of proof is on the defendant because a defendant is presumed sane. *People v Jones*, 151 Mich App 1, 5; 390 NW2d 189 (1986).

Preliminarily, defendant maintains that the prosecution had to prove his legal sanity by a preponderance of the evidence once he had provided proof of his insanity by the same standard. Before 1994, the burden would have shifted to the prosecution. See *People v Savoie*, 419 Mich 118, 126; 349 NW2d 139 (1984). However, after MCL 768.21a(3) was amended in 1994, the statute simply stated that "[t]he defendant has the burden of proving the defense of insanity by a preponderance of the evidence." This means that the prosecution is no longer "shouldered with the burden of proving the failure of an affirmative defense." *People v Mette*, 243 Mich App 318, 330; 621 NW2d 713 (2000). As a result, any of defendant's arguments relying on the prosecution failing to "meet its burden" are without merit.

Here, both defendant and the prosecution presented conflicting evidence regarding defendant's mental state at the time of the crimes. Defendant relies on the fact that he presented more expert witnesses than the prosecution as proof positive that he established by a preponderance of the evidence that he was legally insane. While doing so, defendant discounts the fact that "it is the province of the jury to determine questions of fact and assess the credibility of witnesses." *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). Thus, defendant essentially is asking us to substitute our judgment for the jury's to find that the defense experts were more credible than the other evidence presented. We decline.

> A jury enjoys the same power to assess the credibility of experts and lay persons regarding the issue of insanity. "The jury is the ultimate judge of defendant's sanity at the time of the crime, and in this case, since it had before it evidence of defendant's behavior and state of mind upon the basis of which it could have found defendant sane at that time, it was not bound by the [defendant's] expert opinion testimony . . . ." [*People v Weddell*, 485 Mich 942, 947-949; 774 NW2d 509 (2009) (Corrigan, J., concurring) (quoting *People v Krugman*, 377 Mich 559, 563; 141 NW2d 33 (1966))].

A review of the record reveals that six experts testified for the defense and agreed that defendant is schizophrenic. However, four of the six experts examined defendant to determine his competency to *stand trial*, not his sanity at the time of the offense. Of the two experts who assessed defendant's sanity at the time of the offense, only one was a clinical and forensic psychologist. In rebuttal, the prosecution presented a clinical and forensic psychologist who opined that defendant was not legally insane at the time of the offense. In addition, a police officer who had interviewed defendant on the day of the killings testified that defendant was acting rationally and logically.

"[T]he question of the sufficiency of evidence is to be resolved by the jury unless there is no evidence at all upon a material point." *People v VanDiver*, 79 Mich App 539, 541; 261 NW2d 78 (1977). Here, there was evidence to support a finding that defendant was not legally insane at the time of the killings. Therefore, the jury was within its right, after weighing the evidence, interpreting the experts' opinions, and assessing the witnesses' credibility, to find that defendant was guilty but mentally ill. *People v Renno*, 392 Mich 45, 60; 219 NW2d 422 (1974).

We further note that defendant's reliance on *Burks v United States*, 437 US 1; 98 S Ct 2141; 57 L Ed 2d 1 (1978), is misplaced. First, in *Burks*, different burdens of proof were present since the prosecution had the burden of proving that defendant was sane beyond a reasonable doubt. *Id.* at 3. Second, the *Burks* Court did not examine whether any burden was met; instead, it examined whether double jeopardy was implicated. *Id.* at 5. Thus, *Burks* is of no consequence in the instant matter.

Defendant next argues that his convictions on four counts of murder for the murders of just two people violated the constitutional protection against double jeopardy, US Const, Ams V, XIV. The prosecution does not contest this, and we agree. Double jeopardy does not allow for multiple punishments for the same offense, and convictions for both premeditated murder and felony murder arising from the death of a single victim have been found to violate double jeopardy. *People v Bigelow*, 229 Mich App 218, 200; 581 NW2d 744 (1998). Because defendant was convicted of two counts of first-degree premeditated murder and two counts of second-degree murder when there were only two deaths, we vacate the second-degree murder convictions.

Affirmed in part, vacated in part and remanded for revision of the judgment of sentence in accord with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder
/s/ Donald S. Owens